No. 03-358

IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,
Petitioners,

v.

PUBLIC CITIZEN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether administrative rules of a federal agency that will permit the operation of Mexico-domiciled trucks throughout the United States are subject to the requirement that the agency prepare an Environmental Impact Statement that discloses and evaluates the rules' serious environmental effects under the National Environmental Policy Act, 42 U.S.C. §4332.

2. Whether those same rules require a conformity analysis with state plans under the Clean Air Act, 42 U.S.C. §7506.

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ADDITIONAL PROVISIONS INVOLVED

In addition to the statutes and regulations in petitioners' appendix, respondents' appendix includes other relevant provisions: Chapter 9, Article 904(1) of the North American Free Trade Agreement ("NAFTA"); 19 U.S.C. §3312(a)(1), a portion of the NAFTA Implementation Act; §350(a) of the 2002 Department of Transportation and Related Agencies Appropriations Act, Pub. L. 107-87, 115 Stat. 864-66; and a portion of 40 C.F.R. §93.152.

STATEMENT

Petitioners request that this Court review a narrow decision interpreting the applicability of domestic environmental laws to a federal agency's rulemaking. Petitioners seek review to set aside a purported constraint on the President's discretion over foreign affairs, an issue that was not raised below and that is not implicated in this case. This case does not involve the application of environmental laws to a presidential decision, nor does it challenge the President's ability to conduct foreign policy or the validity of NAFTA. Rather, as the court of appeals explained, the issue in this case "is relatively narrow: we are asked only to review the adequacy of the environmental analyses conducted by [the agency] before promulgating the three regulations" at issue. App. 26a. The court "emphasize[d] that we draw no conclusions about the actions of the President of the United States nor the validity of NAFTA, neither of which is before us." App. 51a.

1. The National Environmental Policy Act ("NEPA"), 42 U.S.C. §§4321-70(f), and the Clean Air Act ("CAA"), 42 U.S.C. §§7401-671(q), have long contained environmental requirements that federal agencies must meet. *See generally* App. 3a-7a.

NEPA requires that "to the fullest extent possible . . . all agencies of the Federal Government shall . . . include in . . . major Federal actions significantly affecting the quality of the human environment, a detailed statement" with respect to "the environmental impact of the proposed action, . . . alternatives to the proposed action," and other environmental issues. 42 U.S.C. §4332. Moreover, "to the fullest extent possible . . . policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in" NEPA. 42 U.S.C. §4332.

The CAA requires each state to develop an implementation plan to comply with federal air quality standards. 42 U.S.C. §7410(a). While imposing this requirement on the states, Congress also ensured that the federal government would not do anything to impede compliance with state plans: "No department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to an implementation plan." 42 U.S.C. §7506(c)(1). Each agency head is responsible for making a determination of conformity. 42 U.S.C. §7506(c)(1).

These NEPA and CAA provisions do not distinguish between duties of an environmental agency and those of other agencies. Nor do these statutes (or the Administrative Procedure Act, 80 Stat. 392, codified as amended, 5 U.S.C. §§551-59, 701-06, which permits judicial review of agency action) excuse agencies from compliance when the President takes a separate action that may also affect the environment.

2. The ratification of NAFTA did nothing to change NEPA or the CAA: *See generally* App. 7a-8a. NAFTA was meant not only to increase trade, but also to "STRENGTHEN the development and enforcement of environmental laws and regulations." NAFTA pmbl., 32 I.L.M. 289, 297 (1993) (capitalization in original). Signatories to NAFTA may "adopt, maintain or apply any standards-related measure, including any such measure relating to . . . protection of human . . . life or health, [or] the environment." NAFTA, Ch. 9, Art. 904(1), 32 I.L.M. at 387. Similarly, when Congress approved NAFTA through the NAFTA Implementation Act, Pub. L. No. 103-182, 107 Stat. 2037, 19 U.S.C. §§3301-473, Congress provided: "No provision of the Agreement, nor the application of any such provision to any person or circumstance, which is inconsistent with any law of the United States shall have any effect." 19 U.S.C. §3312(a)(1).

Accordingly, NEPA and the CAA continue to constrain the actions of federal agencies just as those laws did before NAFTA.

3. For years before and after ratification of NAFTA, Congress and the President maintained a moratorium on the operation of Mexico-domiciled motor carriers within the United States, restricting operations to a narrow commercial zone along the border. *See* App. 9a-10a. After ratification of NAFTA, Congress continued the existing moratorium, and authorized the President to modify or lift it upon making certain determinations. *See* 49 U.S.C. §13902(c). This litigation does not challenge the President's authority to modify or lift the moratorium—or any other presidential authority.

In February 2001, an arbitration panel established pursuant to NAFTA ruled that the refusal of the United States to consider applications of Mexico-domiciled trucks to travel beyond border commercial zones *due to safety concerns* violated NAFTA. *See* App. 10a; C.A. ER 312-13, SER 23. The arbitration panel did not determine whether a delay in considering such applications as a result of compliance with domestic environmentai laws would violate NAFTA. Petitioners do not assert that the panel considered environmental issues at all, and, indeed, the panel did not—nor could it—bar the United States from enforcing NEPA and the CAA, which NAFTA does not override.

4. Respondents agree with petitioners that "[a]lmost immediately after the arbitrators' decision, the President made clear his intention to lift the moratorium on cross-border operations." Pet. for Cert. at 5. The administration stated that it would permit Mexico-domiciled trucks to travel beyond the commercial zones by January 2002. C.A. ER 313. Meanwhile, the Federal Motor Carrier Safety Administration ("FMCSA"), a federal agency within the Department of Transportation ("DOT"), began the process of

preparing rules governing both applications for admission of Mexico-domiciled trucks to the United States and the safety of those trucks. The agency published proposed rules for comment in May 2001. *See* App. 10a.

Congress intervened before the rules became final and prior to any agency consideration of applications by Mexico-domiciled carriers to operate within the United States. On December 18, 2001, the President signed into law the fiscal year 2002 Department of Transportation and Related Agencies Appropriations Act, Pub. L. 107-87, 115 Stat. 833. Section 350 of that Act provides in part: "No funds limited or appropriated in this Act may be obligated or expended for the review or processing of an application by a Mexican motor carrier for authority to operate beyond United States municipalities and commercial zones on the United States-Mexico border until the Federal Motor Carrier Safety Administration" puts into place certain safety and inspection standards for Mexico-domiciled trucks seeking to operate beyond the commercial zones. Pub. L. 107-87, §350(a). The preconditions included that the previously published application and safety rules contain additional requirements, *see* App. 62a, 128a, and that a different rule concerning certification be promulgated, *see* App. 210a.

The conditions in the 2002 DOT Appropriations Act—which were enacted *after* Congress gave the President the authority to lift the moratorium—were independent of any presidential action, and were to remain in place regardless of whether the President lifted the moratorium. Because NAFTA did not change NEPA or the CAA, those statutes applied to FMCSA as it endeavored to promulgate rules complying with the conditions of the new legislation.

In sum, as of mid-December 2001, two key, *independent* barriers prevented Mexico-domiciled trucks from operating throughout the United States: (i) the restrictions Congress imposed in the 2002 DOT Appropriations Act, which

prohibited use of funds to process applications from Mexico-domiciled trucks until the rules at issue in this case are properly promulgated and implemented; and (ii) the moratorium on cross-border trucking maintained by the President as authorized by Congress (which the President had already announced he would lift).

In March 2002, FMCSA issued three sets of Interim Final Rules intended to meet the congressional preconditions for permitting entry of Mexico-domiciled trucks into this country for operation throughout the United States. *See* App. 53a-220a. FMCSA promulgated each of the three rules in order to comply with the 2002 DOT Appropriations Act. App. 53a-54a, 125a, 210a.

5. FMCSA did not prepare an Environmental Impact Statement ("EIS") for any of the three rules as required by NEPA when a federal agency takes major action "significantly affecting the quality of the human environment." 42 U.S.C. §4332(2)(C). Instead, for the two rules that it had originally published in May 2001 and then modified to comply with the 2002 DOT Appropriations Act, *see* App. 11a, FMCSA conducted only an Environmental Assessment ("EA") rather than a thorough EIS, and concluded that there would be no significant environmental effects, App. 107a, 128a; C.A. ER 25. For these two rules, however, FMCSA admitted that NEPA applied to its rulemaking: "*To satisfy the requirements of the National Environmental Policy Act (NEPA)*, FMCSA . . . prepared a Programmatic Environmental Assessment (PEA) to assess the impacts of the proposed rules." C.A. ER 29 (emphasis added). For the third rule, FMCSA found NEPA did not apply because the rule was "categorically excluded." App. 215a-16a. FMCSA failed to conduct a CAA conformity analysis for any of the three rules. App. 12a.

In the EA, petitioners also made a critical concession about the ramifications of the congressional preconditions: "*While*

the appropriations hold is in effect, any Presidential order to modify the statutory moratorium will have no practical effect, since FMCSA would still be prohibited from processing . . . applications." C.A. ER 41 (emphasis added). Despite this, as petitioners admit, the agency's EA failed to attribute to its rules the effects of changes in truck traffic from Mexico. C.A. ER 42; Pet. for Cert. at 8.

Once the preconditions are fulfilled, and FMCSA begins processing applications to cross the border from a large number of Mexico-domiciled trucks, substantial environmental harm will result because those trucks will emit significantly larger quantities of harmful air pollutants than U.S. trucks. *See, e.g.*, C.A. ER 265-70, 362-63. These increased emissions will raise serious public health concerns. *Id.* at 340. The fine particulate matter from such emissions is linked to significant adverse health effects, including both lung cancer and non-cancer respiratory effects such as asthma. *Id.* at 342-45. Epidemiological comparisons of death rates among cities with different levels of air pollution indicate that even moderate differences in fine particle air pollution are associated with increased mortality, with a concentration in cardiovascular causes of death. *Id.* at 340, 343. This represents the largest environmental public health problem that currently exists in this country. *Id.* at 340.

6. Respondents filed timely petitions for review of the three rules. App. 13a. The petitions did not seek to interfere with the President's decision whether to lift the moratorium, but sought only to ensure that FMCSA complied with NEPA and the CAA in promulgating its own rules.

In November 2002, while the litigation was pending, the President lifted the moratorium to permit Mexico-domiciled trucks to cross the border. App. 13a-14a, 232a-34a. Despite this presidential action, Mexico-domiciled trucks were not able to travel into the United States because FMCSA still had to implement the rules that Congress had made a *separate*

pre-condition to the entry of the trucks with the consequent environmental effects. In the almost seven weeks between the time the President lifted the moratorium and the court of appeals issued its decision, FMCSA did not authorize any Mexico-domiciled trucks to travel beyond the border zones.

On January 16, 2003, the court of appeals issued a decision requiring compliance with "long-established environmental laws." App. 51a. The court first found that respondent Public Citizen has standing to pursue this challenge. App. 14a-26a. The critical determination in the standing analysis was that FMCSA's rules would cause environmental harm because trucks would be permitted to cross the border only following the proper promulgation of those rules. *See* App. 18a-22a. The lower court noted that the relief requested would not interfere with presidential action and would not affect the viability of NAFTA. App. 26a. The court of appeals instead found that "the issues before us do not touch on [the President's] clear, unreviewable discretionary authority to modify the moratorium" and that "neither the validity of nor the United States' compliance with NAFTA is before us." *Id.* Petitioners do not contest the standing decision. Pet. for Cert. at 14 n.6.

The court of appeals then addressed NEPA's statutory and regulatory requirements. The lower court found that the rules constitute "major federal actions" under NEPA because their effects cannot be artificially constrained by ignoring the uncontested fact that trucks will be permitted into this country only after the rules go into effect. *See* App. 30a-31a (referring to discussion at App. 18a-22a). The lower court also found that the rules may have a significant environmental impact. App. 31a-42a. Accordingly, the court of appeals found FMCSA acted arbitrarily and capriciously in failing to prepare an EIS. The court also found that no categorical exclusion applied. App. 43a-45a.

Finally, the court of appeals turned to the CAA claims, and held that a conformity determination was required. App. 46a-52a. The lower court found that FMCSA's actions were not subject to either of the CAA exemptions the agency advanced. First, FMCSA did not show that the total of direct and indirect emissions caused by the agency's regulations would fall below *de minimis* amounts. App. 47a-48a. Second, the court held that regulations are not categorically excluded from the conformity analysis requirement. App. 48a-51a.

After the court below issued its January 16, 2003 decision, petitioners filed a petition for rehearing and petition for rehearing *en banc*, which the court of appeals denied without a request for an *en banc* vote by Order of April 10, 2003. App. 221a-22a.

Petitioners did not seek a stay and did not file their Petition for a Writ of Certiorari until September 8, 2003. By the time they filed the Petition, FMCSA had already begun the process of conducting both an EIS and a CAA conformity analysis. Pet. for Cert. at 15 n.7.

7. Meanwhile, on February 20, 2003, after the widely publicized decision by the court of appeals, Congress passed and the President signed into law the 2003 Consolidated Appropriations Resolution, which *extended* the preconditions to the 2003 fiscal year. Pub. L. No. 108-7, Div. I, Tit. III, §348, 117 Stat. 419. Thus, Congress continued the preconditions on Mexico-domiciled trucks crossing the border, with the understanding that FMCSA must complete an EIS and a conformity analysis to meet those preconditions.

REASONS FOR DENYING THE PETITION

This is a petition in search of a problem. Despite petitioners' attempt to convert this case into a foreign policy challenge, it concerns only the routine application of domestic environmental laws to federal agency action. Additionally, the issues presented are well on their way to

resolving themselves without this Court's intervention. FMCSA is presently preparing the required EIS and conformity analysis. And, if there was ever any doubt as to whether Congress meant to require an EIS and a conformity analysis, there can no longer be any question because Congress enacted the same appropriations restriction *after* the court of appeals ruled. Moreover, the decision of the court of appeals creates no conflict among the circuits and is unlikely to do so in the future, as this case arose out of an unusual set of factual circumstances and is *sui generis*. Other than claiming that the court of appeals erred in interpreting certain provisions of NEPA and the CAA (which is neither correct nor a good reason for this Court to grant certiorari even if correct), petitioners focus only on an erroneous allegation that this case interferes with the President's role in foreign affairs. *See, e.g.*, Pet. for Cert. at 24. That claim is not implicated by the challenge to FMCSA's rules that is the subject of this case, and is not even properly before the Court because it was neither raised nor passed on below.

1. There is no reason for the Court to decide the legal questions posed by the idiosyncratic facts of this case because the matter warrants no further judicial intervention. The issue will soon resolve itself, and there is no need for the Court to intervene.

FMCSA has already "entered into a $1.8 million contract with a vendor for the preparation of the EIS and CAA analysis." Pet. for Cert. at 15 n.7. The agency also published a notice of intent to prepare the analyses. 68 Fed. Reg. 51322-23 (Aug. 26, 2003). FMCSA estimates that the studies will be complete as early as the summer of 2004. *See* Press Release, FMCSA, *FMCSA to Prepare Environmental Impact Statement Addressing Effects of Mexican Trucks in U.S., at* http://www.fmcsa.dot.gov/contactus/press/2003/082603.asp (Aug. 26, 2003). Public comments on the scope of the studies were due on November 7, 2003, and FMCSA has held nine

meetings throughout the country to obtain public input into what environmental effects and alternatives should be considered. *Id.*; 68 Fed. Reg. 58162-63 (Oct. 8, 2003).

If the Court were to hear this case, it is likely that an opinion would not issue until late spring or summer of 2004. The EIS and conformity analysis would then be close to completion. The scoping sessions are finished. The drafting of the studies would be far along by the time any opinion issued, by which point FMCSA would have already done most of the work on the project.

FMCSA's actions in this case belie its claim that the EIS and CAA processes should be cut short. The court of appeals ruled almost 10 months ago, FMCSA did not seek a stay, and the Solicitor General asked for two extensions and took 150 days from the denial of *en banc* review to file the Petition. Now, in the midst of conducting the studies—indeed, having notified the public that the agency intends to conduct the reviews and having taken comments from the public—it makes no sense to ask this Court for a ruling to permit FMCSA to cut short the processes to which it and the public have devoted significant time and resources. Petitioners point to no harm from developing the information over the next several months that will permit FMCSA to make an informed decision about the rules at issue.[1]

2. Even if the issues in this case were not well on their way to being resolved without this Court's intervention, the question of statutory interpretation on which the court of appeals ruled is no longer an even arguably open question.

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[1] Were FMCSA to contend that the Court should hear this case because of the cost of conducting the environmental reviews, it would be too late to make that argument. FMCSA has already entered into the contract. Pet. for Cert. at 15 n.7. Even were the contract voidable if the Court were to rule in FMCSA's favor, most of the money would already have been spent.

Petitioners completely ignore that the only question for the judiciary here is what Congress intended and therefore miss the implications of what has occurred since the court of appeals' decision.

NEPA and the CAA are congressional enactments, and Congress has the power to decide whether these statutes should apply in any particular case. There can be no question that Congress has the power to enact a statute requiring an EIS and a conformity analysis before FMCSA permits trucks to cross the border. The only question is whether Congress did mandate such analyses via the preconditions in the appropriations process. That question is readily answered by what Congress did *after* the court of appeals ruled.

Congress legislates with judicial review as a backdrop. *See, e.g., Desert Palace, Inc. v. Costa*, ___ U.S. ___, 123 S.Ct. 2148, 2151 (2003). More particularly, the doctrine of ratification provides that "Congress is presumed to be aware of a . . . judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978).

In this case, the court of appeals filed its decision finding the rules did not comply with NEPA and the CAA on January 16, 2003. The court found that the 2002 DOT Appropriations Act "conditioned funding for permitting Mexican truck traffic into the United States" on the challenged rules, that the rules were an independent cause of trucks being permitted to cross the border, and that the rules therefore caused environmental effects. App. 9a, 19a-23a, 30a-31a, 47a. That decision received widespread publicity in the Washington Post, New York Times, Wall Street Journal, Los Angeles Times, CBS Evening News, and other media sources.

At that point, Congress had the complete power to express its disapproval by stating that nothing in the appropriations language required an EIS or a conformity analysis. Congress

knows how to use such power in the context of the appropriations process, and has exempted certain activities from NEPA's application, including in response to litigation. *See, e.g.*, 2002 Supplemental Appropriations Act for Further Recovery From and Response to Terrorist Attacks on the United States, Pub. L. No. 107-206, Tit. I, Chap. 7, §§706(a)(3), (j), 116 Stat. 864, 868 ("actions authorized by this section shall proceed immediately and to completion notwithstanding any other provision of law including, but not limited to, NEPA").

Congress did not take such action here. To the contrary, after the lower court's ruling Congress affirmatively *extended* the same restrictions for the 2003 fiscal year. In so doing, Congress ratified and adopted the court of appeals' ruling.

That Congress took affirmative action to provide for the continued vitality of the preconditions in this case is of particular significance. Although congressional inaction has generally been rejected as an interpretive aid, *see, e.g., Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 186-87 (1994), affirmative congressional reenactment is recognized as a highly persuasive indicator of congressional intent, *see, e.g., id.* at 185.

Application of the doctrine of ratification is particularly appropriate given the public policy issues involved in this case. Although petitioners mischaracterize this case as one that involves interference with the President's foreign-affairs power rather than as a simple exercise of Congress' power, this matter undeniably implicates public policy considerations. By reenacting the appropriations language after the court of appeals' decision, Congress spoke on how to balance the competing public policy concerns at issue. It is not the province of the judiciary to question the soundness of Congress' judgment in this arena. *See Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978) (noting "exclusive

province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation"). As Congress has clearly manifested its intent in the 2003 fiscal year, there is no reason for this Court to decide whether the court of appeals was correct about what Congress meant in the 2002 DOT Appropriations Act.

3. Petitioners ignore that all the decision below did is enforce a congressional act, and instead argue that this challenge seeks to interfere with the President's constitutional power over foreign affairs. This argument is based on a misconception of this case, which we explain below. As a threshold matter, however, the argument is not properly before the Court because petitioners *failed to raise the issue below*, and the court of appeals therefore did not address whether its decision unconstitutionally impeded the President's foreign-affairs powers.

a. This Court's "traditional rule" is that it will not hear a case "when the question presented was not pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks omitted); *see also City of Springfield v. Kibbe*, 480 U.S. 257, 258-60 (1987) (per curiam) (dismissing writ of certiorari as improvidently granted).

The present petitioners, as respondents in the court of appeals, did not press the President's foreign-affairs power. Instead, they argued (incorrectly) that environmental effects would occur only "as a result of future action that the President may take with respect to trade policy" and "as a result of modifying the moratorium." C.A. Resp. Brief at 35, 47. They also claimed that the court of appeals should not question "the wisdom of the decision to liberalize trade barriers" under NAFTA. C.A. Resp. Supp. Brief. at 13. Neither in their merits briefs nor in oral argument, however,

did petitioners argue that an adverse decision could interfere with the President's constitutional power over foreign affairs. Likewise, the court of appeals' opinion does not address the foreign-affairs argument that petitioners now raise. Accordingly, this Court should decline to grant certiorari to address the President's foreign-affairs power.

b. Notwithstanding their failure to raise the issue below, petitioners now claim that the foreign-affairs question is important enough to warrant review by this Court. Properly understood, however, there is *no* foreign affairs issue in this case.

Petitioners suggest that this case poses the question whether the President's action in lifting the moratorium is subject to NEPA, and argue that the court of appeals required "a full NEPA review of the President's foreign-policy decision to open the border." Pet. for Cert. at 15. As if repetition would make it so, petitioners repeat similar assertions throughout. *See id.* at 2, 15, 16, 17, 21, 22. But respondents do not make such a claim, and the court of appeals did not so hold.

Respondents do *not* challenge any presidential action in lifting the moratorium or otherwise, nor do they challenge NAFTA. Rather, they challenge a *federal agency's* failure to conduct statutorily required environmental reviews before promulgating and implementing rules as required by Congress. Challenges to such actions are wholly proper. *See, e.g., Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 681 (1986) (stating presumption that Congress "expects the courts to grant relief" if federal agency violates statutory command). Here, FMCSA did not conduct environmental reviews required by statute. Actions challenging such failure are commonplace.

That FMCSA and the President both have roles to play in making decisions about cross-border trucking does not

preclude judicial review of *FMCSA's* compliance with environmental laws. The Administrative Procedure Act permits review of "final agency action." 5 U.S.C. §704; *see also Bennett v. Spear*, 520 U.S. 154, 175 (1997); *id.* at 177-78 (agency action is final when it marks "consummation of the agency's decisionmaking process" and either "rights or obligations have been determined" or "legal consequences will flow") (internal quotation marks omitted). Petitioners did not dispute below that FMCSA's rules at issue constitute final agency action regardless of the President's entirely separate decision about whether to lift the moratorium, and the test for final agency action is readily met here.[2]

This is not a case where an agency merely provides a *recommendation* to the President, who then has final decisionmaking authority, and hence the agency recommendation does not constitute final agency action. *See Franklin v. Massachusetts*, 505 U.S. 788, 797-99 (1992). Unlike the situation in *Franklin*, the rules here are not a recommendation, as there is no further action for the President to take with respect to them. Moreover, under the appropriations language, FMCSA's action has independent, legally operative effect with respect to whether Mexico-domiciled trucks will be permitted to cross into this country. In *Bennett*, the Court clarified the limited nature of *Franklin*, noting that "our holding that this [action] did not constitute 'final agency action' was premised on the observation that the report carried 'no direct consequences' and served 'more like a tentative recommendation than a final and binding determination.'" 520 U.S. at 178 (quoting *Franklin*, 505 U.S. at 798). In other words, challenges to

[2] Notably, the EIS here will be far from the first EIS conducted against the backdrop of an international agreement. For instance, the Air Force prepared an EIS with regard to deactivation of a missile system that would be required by a treaty between the United States and Russia. *See* 64 Fed. Reg. 31553-34 (June 11, 1999).

administrative proceedings that are final without presidential action are permitted.

Here, the court of appeals did not review the President's action, finding that "the issues before us do not touch on his clear, unreviewable discretionary authority to modify the moratorium." App. 26a. The lower court reviewed only agency action. App. 51a. Petitioners are simply wrong in asserting to the contrary. *See* Pet. for Cert. at 25.

Nor did the court of appeals interfere with any commitments of this country. NAFTA expressly preserves the applicability of domestic environmental laws, and the NAFTA arbitration panel decision did not address the enforcement of those laws. Far from interfering with NAFTA, the court of appeals required compliance with its terms.

This case is about routine enforcement of domestic environmental laws. Those laws constrain agency action for the purpose of protecting the environment, a function that NAFTA expressly allows and Congress has required. Moreover, to the extent this case touches on relations with foreign governments, it does so with respect to *foreign commerce*. As petitioners recognize, Congress has the power to regulate foreign commerce. Pet. for Cert. at 3.

Petitioners do not contest Congress' power to impose preconditions on FMCSA's processing of applications for trucks to cross the border. But petitioners mistake these preconditions as conditions on the President's lifting of the moratorium. *See* Pet. for Cert. at 25. By their terms, the preconditions apply to the *agency's* expenditure of funds to review or process applications. Pub. L. 107-87, §350(a). The preconditions do not apply to the President's act of lifting the moratorium, which was not constrained by the appropriations language. Congress acted well within its authority in imposing preconditions on agency action; and in so doing,

Congress did not impinge on the power of the President to conduct foreign affairs.

4. The court of appeals correctly held that an EIS and a CAA conformity analysis are required. We start with NEPA.

There is no dispute that FMCSA must comply with NEPA. *See* 42 U.S.C. §4332(2) (applying EIS requirement to "all agencies of the Federal Government"). Congress provided that "major Federal actions significantly affecting the quality of the human environment" require an EIS. 42 U.S.C. §4332(2)(C). We address the two basic prerequisites—"major Federal actions" and "significantly affecting the environment"—separately.

a. The Council on Environmental Quality ("CEQ") regulations implementing NEPA are "binding on all Federal agencies." 40 C.F.R. §1500.3. The CEQ regulations state: "'Major Federal action' includes actions with effects that may be major and which are potentially subject to Federal control and responsibility." 40 C.F.R. §1508.18 (emphasis omitted). Petitioners take issue only with whether the federal agency action has "effects" that trigger the EIS requirement. The CEQ regulations define "effects" to include "[i]ndirect effects, which are *caused by* the action and are later in time or farther removed in distance, but are still *reasonably foreseeable*." 40 C.F.R. §1508.8(b) (emphases added).

With respect to the causation prong of the analysis, the rules at issue fulfill congressional preconditions on permitting Mexico-domiciled trucks to cross the border. *See* App. 53a-54a, 125a, 210a. As such, the rules are a prerequisite for Mexico-domiciled trucks to travel outside the designated border commercial zones with the attendant environmental effects. Without implementation of the challenged rules, it would be illegal for the agency to spend any appropriated money to process applications that would allow Mexico-

domiciled trucks to travel to interior points in the United States. The effects of admitting such trucks are therefore caused by FMCSA's rules.

The President's authority to lift the moratorium on trucks crossing the border does not break the causal connection between the rules and environmental effects. Because of the congressional preconditions, *no matter what happens* with regard to the moratorium, Mexico-domiciled trucks cannot travel throughout the United States unless the challenged rules are implemented. That is why FMCSA admitted in the EA: "While the appropriations hold is in effect, any Presidential order to modify the statutory moratorium will have no practical effect." C.A. ER 41. Similarly, petitioners concede:

> The spending restrictions of Section 350 did establish the promulgation of FMCSA's safety rules as a *condition precedent* to processing Mexican carriers' applications for operating authority under the regulatory statutes administered by FMCSA. That function of processing applications is *separate* from the President's decision to lift the moratorium.

Pet. for Cert. at 19-20 (emphases added).

The challenged rules cause environmental effects because *regardless* of what the President does, Congress has prohibited FMCSA from processing applications from Mexico-domiciled trucks until the rules are in place. Nor is FMCSA merely "implementing a policy of the President" in promulgating the rules. Pet. for Cert. at 16. Rather, *Congress* made the *agency's* action a precondition to the entry of Mexico-domiciled trucks. FMCSA is only implementing presidential policy in the sense that *every* executive branch agency in every situation is in some sense implementing the President's policy. This does not affect the applicability of NEPA. The court of appeals recognized this, noting several times that the actions of the President and the agency were

independent (App. 19a, 21a), and finding that "both had to take action for the event to occur." App. 19a.

To be sure, in certain circumstances "but for" causation by itself may not be sufficient to establish the requisite causal link. *See Metropolitan Edison v. People Against Nuclear Energy*, 460 U.S. 766, 773-74 (1983). This is not one of those cases. Unlike in *Metropolitan Edison*, where the issue was possible psychological harm from the risk of a nuclear accident, the harm here is classic harm to the physical environment. The case here is no different from the numerous NEPA matters where an agency must prepare an EIS before issuing a permit even though other independent action must also take place before environmental effects will result. *See, e.g., Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 336-37 (1989) (Forest Service "special use permit" that authorizes development of ski resort constitutes "major Federal action"); *Aberdeen & Rockfish R.R. Co. v. SCRAP*, 422 U.S. 289, 299, 318-19 (1975) (Interstate Commerce Commission general revenue proceeding that was necessary for railroad companies to raise rates, which could cause environmental harm, is "major federal action").

Even were this a case where "but for" causation were not itself sufficient, the courts would still be required to "look to the underlying policies or legislative intent in order to draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not." *Metropolitan Edison*, 460 U.S. at 774 n.7. This is a particularly strong case with respect to the underlying policies and legislative intent because they are revealed not only by general indications but also by very specific congressional commands. NEPA's general policies are comprehensive. *See, e.g.*, 42 U.S.C. §4332 (NEPA must be applied "to the fullest extent possible"); *Robertson*, 490 U.S. at 348-50 (discussing NEPA's broad purposes). More important, Congress confirmed that it intended FMCSA's actions to be

subject to NEPA when, after the lower court's decision requiring an EIS, Congress reenacted express appropriations language to continue to make the rules a precondition for cross-border trucking.

With respect to the foreseeability prong of the analysis, it was certainly foreseeable that implementing the rules would lead to adverse environmental effects. Petitioners complain that the court of appeals based its holding that FMCSA must prepare an EIS on a finding that "the President's lifting of the moratorium was a 'reasonably foreseeable' consequence of FMCSA's rulemakings." Pet. for Cert. at 15 (quoting App. 31a). Petitioners mistake the holding of the court of appeals. When the lower court noted "that the President's rescission of the moratorium was 'reasonably foreseeable' at the time the EA was prepared and the decision not to prepare an EIS was made" (App. 31a), the court was not making a finding that the rules would *cause* the President's action. The court of appeals was merely stating that, as petitioners concede, the President had already made up his mind to lift the moratorium; therefore, it was "reasonably foreseeable" that, if FMCSA implemented the rules, environmental effects would occur. In other words, in a situation where there are two independent causes of environmental effects, and one of them is a forgone conclusion, the second cause has effects that are reasonably foreseeable.

Petitioners make a similar mistake in arguing that the court of appeals' opinion subjects a presidential decision to NEPA. Pet. for Cert. at 16. As we have previously explained, this is not a challenge to presidential action. It is not the President's decision that is subject to review—it is the promulgation of the rules. The relevant question is whether the *agency's* actions will significantly affect the environment.[3]

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[3] The regulatory scheme ensures in many different ways that agencies cannot evade environmental review. *See, e.g.*, 40 C.F.R. §1508.25(a)(2) (cumulative actions); 40 C.F.R. §1508.7 (cumulative impact); 40 C.F.R.

b. With respect to whether FMCSA's rules "significantly affect[] the quality of the human environment," 42 U.S.C. §4332(2)(C), FMCSA refused to prepare an EIS under two separate rationales. For two of the rules, FMCSA claimed that the EA demonstrated no significant effects. App. 107a, 128a. FMCSA claimed the remaining rule was categorically excluded from NEPA. App. 215a-16a. Petitioners do not challenge the court of appeals' finding that no categorical exclusion applies. Pet. for Cert. at 13 n.5.

Petitioners continue to rely on the contention that the President's decision to lift the moratorium—not FMCSA's rules—is the cause of the environmental effects. *See* Pet. for Cert. at 20-21. Again, however, because of the congressional appropriations preconditions, nothing the President did by himself could cause the trucks to cross the border absent promulgation and implementation of FMCSA's rules.

Petitioners make no attempt to explain why, if the rules constitute "major federal action" as demonstrated above, they do not significantly affect the environment. The court of appeals carefully applied CEQ regulations interpreting "significant" effects on the environment and determined that the EA was inadequate. App. 31a-42a. Petitioners do not rebut, and therefore concede, that the EA does not properly analyze localized effects (App. 33a), long-term effects (App. 34a), effects on public health and safety (App. 35a), uncertain environmental effects (App. 35a-39a), and effects on California air pollution laws (App. 39a-40a); nor do they contest that the rulemaking concerns a controversial matter (App. 40a-42a).

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§1508.25(a)(1) (connected actions). Petitioners take issue with the court of appeals' reliance on cumulative effects. Pet. for Cert. at 17. In so doing, petitioners attempt to limit consideration of cumulative effects to the effects of FMCSA's actions. *Id.* But the CEQ regulations do not so limit the scope of cumulative effects. *See* 40 C.F.R. §1508.7. The cumulative effects are another reason FMCSA should have prepared an EIS.

It is important to understand that the court of appeals' decision does not demand that the EIS examine any particular alternative or that the agency reach a particular result. *See* App. 39a; *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 737 (1998) ("NEPA . . . simply guarantees a particular procedure, not a particular result."). NEPA merely mandates "action-forcing procedures that require that agencies take a hard look at environmental consequences." *Robertson*, 490 U.S. at 350 (internal quotation marks omitted).

At the same time, however, an EIS is an important, mandatory requirement. The two arguments that petitioners make to excuse their failure to conduct an EIS on grounds of "common sense" do not apply. *See* Pet. for Cert. at 18.[4] First, although it is certainly true that a "rule of reason" applies to the content of an EIS once an agency decides to prepare one, *see* 40 C.F.R. §1502.2(b), it is of no moment that an EIS requires only a brief discussion of insignificant issues, as respondents have submitted to the agency numerous *significant* environmental issues that need to be addressed. Second, the suggestion that obtaining information would require an exorbitant cost is not only erroneous but moot because FMCSA has already contracted to have the EIS prepared. Petitioners have not shown that the cost of this EIS is more than many other EIS's that federal agencies have been required to undertake. To the extent petitioners invite resort to "common sense" rather than the law, they miss the most important commonsense issue here: Under NEPA, severe environmental effects may not occur until full information is available.

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[4] In addition, this argument was not raised below and is therefore waived.

c. Nor can petitioners prevail by claiming that FMCSA is not an environmental agency, has no control over environmental effects, and is "lacking any regulatory responsibility for . . . motor vehicle emissions." Pet. for Cert. at 6, 15, 17. NEPA requires an EIS for "major Federal actions significantly affecting the quality of the human environment" without regard to the agency's power to protect the environment. 42 U.S.C. §4332(2)(C). The statute ensures that environmental issues are considered along with more traditional priorities. *See, e.g.*, 42 U.S.C. §4332(2)(B). NEPA specifically makes its policies and goals "*supplementary* to those set forth in existing authorizations of Federal agencies." 42 U.S.C. §4335 (emphasis added). Courts have frequently applied NEPA to agencies possessing statutory duties that do not explicitly concern environmental issues. *See, e.g., Aberdeen*, 422 U.S. at 318-19 (holding Interstate Commerce Commission's general revenue proceeding requires EIS so long as proceeding has substantial environmental effect). Nor does anything in FMCSA's statutory authorization expressly prohibit or make impossible compliance with NEPA, which is the standard under 40 C.F.R. §1500.6.

Moreover, the actions that FMCSA takes with regard to the rules will have a direct relation to environmental effects. The EA states that through the rules "FMCSA expects to target the highest risk [trucks] and bring them into compliance with United States safety *and environmental* laws, standards, policies, rules, and regulations." C.A. ER 114 (emphasis added); *see also* App. 91a (noting agency added language to application form stating that compliance with environmental laws is mandatory). Moreover, in the court of appeals, FMCSA admitted that *the safety related requirements* the challenged rules impose on Mexico-domiciled trucks *have important environmental implications*: FMCSA suggested that increased emissions from Mexico-domiciled trucks will not be as great because "the heightened standards put into

place by the challenged safety rules will tend to restrict the number of older (pre-1993) Mexican trucks that can be operated in the United States." C.A. Resp. Brief at 58; *see also* C.A. Resp. Supp. Brief at 11 n.4. (It is these older trucks that are the most polluting.) If increasing the stringency of safety standards to the extent required by the challenged rules is likely to produce corresponding environmental benefits, then increasing the stringency even more should yield even greater environmental benefits. FMCSA has non-ministerial discretion to choose amongst various options and in so doing to alleviate environmental effects.[5]

Additionally, FMCSA may have other ways to protect the environment from some of the adverse effects of certifying Mexico-domiciled trucks to travel to interior points within the United States. *See* 42 U.S.C. §4332(2)(C)(iii) (providing that EIS should discuss "alternatives to the proposed action"). For example, FMCSA could engage in cooperative agreements to include emissions inspections with safety inspections. The focus on alternatives to environmentally destructive action that is the hallmark of NEPA's EIS requirement is meant to stimulate agencies to identify and examine innovative options for protecting the environment while accomplishing the agency's primary goals. *See, e.g., Robertson*, 490 U.S. at 351 ("one important ingredient of an EIS is the discussion of steps that can be taken to mitigate adverse environmental conse-

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[5] Petitioners' argument that this point is waived because it was not raised until a reply brief (Pet. for Cert. at 21 n.10) is unavailing. The point was rebuttal to an argument raised in the opposition brief, as permitted by the court of appeals. *See, e.g., United States v. Bohn*, 956 F.2d 208, 209 (9th Cir. 1992) (per curiam). Additionally, this Court will entertain an argument that was either "pressed *or* passed upon below." *Williams*, 504 U.S. at 41 (emphasis added). Because the court of appeals addressed the issue, App. 23a, 42a, it is properly before this Court.

quences").[6] FMCSA is required to consider these issues just like every other agency.[7]

5. The court of appeals also interpreted the CAA correctly. A federal "department, agency, or instrumentality" is forbidden from supporting or approving an activity that fails to conform to state plans to achieve air quality standards. 42 U.S.C. §7506(c)(1).[8] Federal agencies must make a determination that an action conforms to the relevant state air quality plan based upon a conformity analysis before taking an action that will cause direct or indirect emissions that exceed certain levels. *See* 40 C.F.R. §§93.150(b), 93.153(b), 93.154.[9]

Petitioners concede that agencies must consider both "direct emissions" and "indirect emissions" in performing a conformity analysis. Pet. for Cert. at 23. The emissions from Mexico-domiciled trucks fall within the definition of "indirect emissions," which "[a]re caused by the Federal action, but may occur later in time and/or may be further

[6] Moreover, compliance with NEPA will provide important information to agency decisionmakers and the public, which is an important purpose of the statute. *See Robertson*, 490 U.S. at 349; 40 C.F.R. §1500.1(b).

[7] Petitioners' suggestion that they should have had a chance to determine whether to prepare an EIS on remand even though the court of appeals found an EIS to be necessary (Pet. for Cert. at 18-19 n.8) was not raised below and is therefore waived. Nor is this a sufficient reason for the Court to grant review even if it were correct and not waived. In any event, given the record of potentially severe environmental consequences in this case, App. 33a-40a, there is no question that an EIS is necessary to fulfill NEPA's purposes.

[8] Petitioners' authorities do not stand for the proposition that the President is not an instrumentality under the CAA. As FMCSA is unquestionably subject to the CAA, however, this issue need not be reached.

[9] FMCSA relied below on an exemption for certain rulemakings, but petitioners no longer raise this argument. Pet. for Cert. at 10 n.4.

removed in distance from the action itself but are still reasonably foreseeable," and which "[t]he Federal agency can practicably control and will maintain control over due to a continuing program responsibility of the Federal agency." 40 C.F.R. §93.152. Petitioners do not contest the first prong of the test.

As to the second prong, "continuing program responsibility" has the following meaning under the regulations: "When an agency, in performing its normal program responsibilities, takes actions itself or imposes conditions that result in air pollutant emissions by a non-Federal entity taking subsequent actions, such emissions are covered by the meaning of a continuing program responsibility." 40 C.F.R. §93.152. FMCSA is conducting its normal responsibilities in promulgating and implementing the challenged rules. As we have shown, this action will result in emissions because the rules will result in Mexico-domiciled trucks traveling beyond the border commercial zones and emitting pollution. As such, the rules come within the definition of "continuing program responsibility."

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

Additional Provisions Involved

1. North American Free Trade Agreement and Implementation Act

a. Chapter 9, Article 904(1) of the North American Free Trade Agreement provides as follows:

> Each Party may, in accordance with this Agreement, adopt, maintain or apply any standards-related measure, including any such measure relating to safety, the protection of human, animal or plant life or health, the environment or consumers, and any measure to ensure its enforcement or implementation. Such measures include those to prohibit the importation of a good of another Party or the provision of a service by a service provider of another Party that fails to comply with the applicable requirements of those measures or to complete the Party's approval procedures.

b. 19 U.S.C. §3312(a)(1) provides as follows:

> No provision of the Agreement, nor the application of any such provision to any person or circumstance, which is inconsistent with any law of the United States shall have effect.

2. 2002 Department of Transportation and Related Agencies Appropriations Act

Section 350(a) of Pub. L. 107-87, 115 Stat. 864-66, provides as follows:

> No funds limited or appropriated in this Act may be obligated or expended for the review or processing of an application by a Mexican motor carrier for authority to operate beyond United States municipalities and commercial zones on the United States-Mexico border until the Federal Motor Carrier Safety Administration—

(1)(A) requires a safety examination of such motor carrier to be performed before the carrier is granted conditional operating authority to operate beyond United Statesmunicipalities and commercial zones on the United States-Mexico border;

(B) requires the safety examination to include—

(i) verification of available performance data and safety management programs;

(ii) verification of a drug and alcohol testing program consistent with part 40 of title 49, Code of Federal Regulations;

(iii) verification of that motor carrier's system of compliance with hours-of-service rules, including hours-of-service records;

(iv) verification of proof of insurance;

(v) a review of available data concerning that motor carrier's safety history, and other information necessary to determine the carrier's preparedness to comply with Federal Motor Carrier Safety rules and regulations and Hazardous Materials rules and regulations;

(vi) an inspection of that Mexican motor carrier's commercial vehicles to be used under such operating authority, if any such commercial vehicles have not received a decal from the inspection required in subsection (a)(5);

(vii) an evaluation of that motor carrier's safety inspection, maintenance, and repair facilities or management systems, including verification of recordsof periodic vehicle inspections;

(viii) verification of drivers' qualifications, including a confirmation of the validity of the Licencia de Federal de Conductor of each driver of that motor carrier who will be operating under such authority; and

(ix) an interview with officials of that motor carrier to review safety management controls and evaluate any written safety oversight policies and practices.

(C) requires that—

(i) Mexican motor carriers with three or fewer commercial vehicles need not undergo on-site safety examination; however 50 percent of all safety examinations of all Mexican motor carriers shall be conducted onsite; and

(ii) such on-site inspections shall cover at least 50 percent of estimated truck traffic in any year.

(2) requires a full safety compliance review of the carrier consistent with the safety fitness evaluation procedures set forth in part 385 of title 49, Code of Federal Regulations, and gives the motor carrier a satisfactory rating, before the carrier is granted permanent operating authority to operate beyond United States municipalities and commercial zones on the United States-Mexico border, and requires that any such safety compliance review take place within 18 months of that motor carrier being granted conditional operating authority, provided that—

(A) Mexican motor carriers with three or fewer commercial vehicles need not undergo onsite compliance review; however 50 percent of all compliance reviews of all Mexican motor carriers shall be conducted on-site; and

(B) any Mexican motor carrier with 4 or more commercial vehicles that did not undergo an on-site safety exam under (a)(1)(C), shall undergo an on-site safety compliance review under this section.

(3) requires Federal and State inspectors to verify electronically the status and validity of the license of each driver of a Mexican motor carrier commercial vehicle crossing the border;

(A) for every such vehicle carrying a placardable quantity of hazardous materials;

(B) whenever the inspection required in subsection (a)(5) is performed; and

(C) randomly for other Mexican motor carrier commercial vehicles, but in no case less than 50percent of all other such commercial vehicles.

(4) gives a distinctive Department of Transportation number to each Mexican motor carrier operating beyond the commercial zone to assist inspectors in enforcing motor carrier safety regulations including hours-of-service rules under part 395 of title 49, Code of Federal Regulations;

(5) requires, with the exception of Mexican motor carriers that have been granted permanent operating authority for three consecutive years—

(A) inspections of all commercial vehicles of Mexican motor carriers authorized, or seeking authority to operate beyond United States municipalities and commercial zones on the United States-Mexico border that do not display a valid Commercial Vehicle Safety Alliance inspection decal, by certified inspectors in accordance with the requirements for a Level I Inspection under the criteria of the North American Standard Inspection

(as defined in section 350.105 of title 49, Code of Federal Regulations), including examination of the driver, vehicle exterior and vehicle under-carriage;

(B) a Commercial Vehicle Safety Alliance decal to be affixed to each such commercial vehicle upon completion of the inspection required by clause (A) or a re-inspection if the vehicle has met the criteria for the Level I inspection; and

(C) that any such decal, when affixed, expire at the end of a period of not more than 90 days, but nothing in this paragraph shall be construed to preclude the Administration from requiring reinspection of a vehicle bearing a valid inspection decal or from requiring that such a decal be removed when a certified Federal or State inspector determines that such a vehicle has a safety violation subsequent to the inspection for which the decal was granted.

(6) requires State inspectors who detect violations of Federal motor carrier safety laws or regulations to enforce them or notify Federal authorities of such violations;

(7)(A) equips all United States-Mexico commercial border crossings with scales suitable for enforcement action; equips 5 of the 10 such crossings that have the highest volume of commercial vehicle traffic with weigh-in-motion (WIM) systems; ensures that the remaining 5 such border crossings are equipped within 12 months; requires inspectors to verify the weight of each Mexican motor carrier commercial vehicle entering the United States at said WIM equipped high volume border crossings; and

(B) initiates a study to determine which other crossings should also be equipped with weigh-in-motion systems;

(8) the Federal Motor Carrier Safety Administration has implemented a policy to ensure that no Mexican motor carrier will be granted authority to operate beyond United States municipalities and commercial zones on the United States-Mexico border unless that carrier provides proof of valid insurance with an insurance company licensed in the United States;

(9) requires commercial vehicles operated by a Mexican motor carrier to enter the United States only at commercialborder crossings where and when a certified motor carrier safety inspector is on duty and where adequate capacity exists to conduct a sufficient number of meaningful vehicle safety inspections and to accommodate vehicles placed out-of-service as a result of said inspections.

(10) publishes—

(A) interim final regulations under section 210(b) of the Motor Carrier Safety Improvement Act of 1999 (49 U.S.C. 31144 note) that establish minimum requirements for motor carriers, including foreign motor carriers, to ensure they are knowledgeable about Federal safety standards, that may include the administration of a proficiency examination;

(B) interim final regulations under section 31148 of title 49, United States Code, that implement measures to improve training and provide for the certification of motor carrier safety auditors;

(C) a policy under sections 218(a) and (b) of that Act (49 U.S.C. 31133 note) establishing standards

for the determination of the appropriate number of Federal and State motor carrier inspectors for the United States-Mexico border;

(D) a policy under section 219(d) of that Act (49 U.S.C. 14901 note) that prohibits foreign motor-carriers from leasing vehicles to another carrier to transport products to the United States while the lessor is subject to a suspension, restriction, or limitation on its right to operate in the United States; and

(E) a policy under section 219(a) of that Act (49 U.S.C. 14901 note) that prohibits foreign motor carriers from operating in the United States that is found to have operated illegally in the United States.

3. Clean Air Act

40 C.F.R. §93.152 provides in part:

When an agency, in performing its normal program responsibilities, takes actions itself or imposes conditions that result in air pollutant emissions by a non-Federal entity taking subsequent actions, such emissions are covered by the meaning of a continuing program responsibility.